THE RAILROAD BILL AND THE COURT OF COMMERCE

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The new railroad bill considerably widens the domain of federal control over interstate railroad transportation, and should serve to elevate the Interstate Commerce Commission to a position of correspondingly enhanced influence. New matters have been subjected to the jurisdiction of that body, and its powers in those matters already confided to it are substantially augmented in important particulars. But interesting as are these portions of the new law in themselves, they represent in the main nothing more than extensions and elaborations of principles already firmly established in former Acts regulating interstate commerce. To the student of constitutional law they present no problem that has not been thoroughly discussed in the debates over previous bills or settled by the courts. His attention, however, is at once arrested by the court feature of the new bill, although this occupied a position of secondary importance in the debates in Congress. This newly created Court of Commerce represents a notable innovation in the judicial system of the United States. It is a tribunal unlike any other known to American law, and its establishment warns us that even the judiciary may not wholly escape the effect of the universal tendency toward specialization which is such a prominent feature of modern life.

The Commerce Court is created and its jurisdiction defined in Sections 1-6 of the bill as passed. It is given exclusive cognizance of certain specified classes of railroad cases. It will be composed of five circuit judges of the United States, of whom four shall constitute a quorum, and three must concur in its decisions. In the first instance the new tribunal is to be manned by five additional circuit judges to be appointed by the Presi-

dent and designated by him to serve in it one, two, three, four and five years respectively. As the term of each of these new judges expires, his place will be filled by a judge to be assigned by the Chief Justice from among the present circuit judges of the United States for a period of five years. Each judge, after his retirement from the Commerce Court, is made ineligible for reappointment therein for at least one year. But if business is slack in the new court, its judges may be temporarily sent to any circuit court or circuit court of appeals. The new court is equipped with a seal, a full corps of marshals and clerks, and powers similar to those of a circuit court of the United States. Appeals may be taken direct to the Supreme Court. Detailed provisions regulate the issuance by the court of mandates temporarily suspending orders of the Interstate Commerce Commission until after final hearing. Lastly, it is provided that suits which would otherwise be defended by the Interstate Commerce Commission shall henceforth be brought against the United States and managed by the Attorney-General; but in all proceedings in the Commerce Court the United States, the Interstate Commerce Commission, or any individual, corporation, association or community interested or affected, may intervene as of right and be represented by counsel.

In his message of January 7, 1910, in which the subject of this new court was first officially broached to Congress, the President assigns as the principal reasons for its establishment the expedition and uniformity which it may be expected to introduce into railroad cases. His position, however, was sharply assailed by many members of both the Senate and the House of Representatives, who pointed out that the delays complained of have usually been attributable to the complexity and volume of the testimony to be taken, and the time required to perfect appeals—causes which would tend equally to retard proceedings in the new court. As to the promised uniformity of decision, this can be supplied by the utterances of the Supreme Court alone, irrespective of the courts from which the appeal is taken.

It undoubtedly seems difficult to refute the above reasoning. The "uniformity" argument need not be further elaborated.

The principal improvement in the matter of "expedition" afforded by the new bill lies in the provisions made for simplified procedure and for transmission on appeal of the original record instead of a printed transcript to the Supreme Court, both of which could have been equally well applied to the existing judicial system. It is not the railroad cases but rather the general business of the federal courts that is most apt to be accelerated by the establishment of this new court. The transference of railroad cases to a special tribunal will of course relieve the dockets of the regular courts by so much; but it is a grave question whether the advantages thence resulting are sufficient to justify the expense of the commerce court, especially in view of the paucity of cases which are likely to find their way to it.

The above considerations, however, relate to the expediency of the new court, not to its legal character. From the latter point of view, the first question of importance is as to whether the Commerce Court is a "court of the United States," in the constitutional sense. Many consequences hang upon the answer that may be returned. If the Commerce Court is not a constitutional court, the Chief Justice will doubtless refuse to designate circuit judges to sit in it. These same circuit judges, even if duly assigned, might decline to act. On the other hand, the newly appointed judges, at the end of their terms of office in the Commerce Court, might not be recognized as circuit judges of the United States authorized to wield the federal judicial power.

Be it noted in passing that there is no question of "due process of law" involved in the problem. Whether the Commerce Court be an administrative or a judicial court is really immaterial so far as the rights of the carriers and the public are concerned, because orders of the Interstate Commerce Commission are in either event ultimately reviewed by the Supreme Court itself. The right of appeal is unrestricted, and is made the more effective by the precedence given to these railroad cases over all but criminal cases. This appeal will doubtless be entertained by the Supreme Court, even if the Commerce Court be not a constitutional court, as is done in cases coming from territorial courts, the court of claims, the commissioner of patents, and other spec-

ial tribunals that admittedly do not exercise the judicial power of the United States. Hence, there cannot be any legal obstacle in the way of requiring parties affected by the action of an administrative board to appeal to an administrative court before they obtain such judicial review as they may be entitled to.

There is no doubt that Congress intended to make the Commerce Court a court of the United States. The new court is so described in the enacting clause of the bill. It is given powers and privileges similar to those conferred upon the existing circuit courts "so far as the same may be appropriate to the effectiveness of the jurisdiction hereby conferred." Its authority and that of its officers may be exercised anywhere in the United States. It is given power to issue all writs and process incident to the full exercise of its jurisdiction, and these are made effective throughout the country, and are to be treated in all respects like those issued by the existing courts. But in spite of these and other similarities between the Commerce Court and the federal circuit and district courts, there are two striking points of difference. First, the Commerce Court is given cognizance over only a single class of cases: second, its judges sit in it for limited terms of years, at the end of which they must be transferred to other courts. We have to inquire, therefore, whether either of these differences affects the juridical character of the new court.

Many practical objections were urged in debate against the creation of this court of special and limited jurisdiction. It was said that the appointment of the judges would be surrounded by political influences; that this specialized court would increase the tendency toward centralization; and that judges who try only railroad cases will be exposed to the danger of becoming narrow in their views. The objection most frequently pressed, however, against this particular feature of the bill, was that a special court such as this, with jurisdiction confined to a single class of cases, is foreign to the entire genius of our judicial system, which heretofore had known only courts of general jurisdiction.

These objections were directed against the policy, not the constitutionality of the bill. And although it is true that special

courts of this character were probably not contemplated by the framers of the Constitution, and have never before been seen in American legal history, we cannot for that reason alone believe the present law unconstitutional. Congress is given a general power to ordain and establish such inferior courts as it may think "necessary and proper." And although we may not approve of such a radical departure from the established judicial system, it must be recollected that this is the creation of statute only and can be changed in the same mode. It is likewise true that the present district courts possess only jurisdiction over special classes of cases, so the question would at once arise, where should the line be drawn between courts of special and general jurisdiction? Finally, it would seem difficult to establish the proposition that a court cannot be given jurisdiction over certain classes of cases which appear to call for special treatment solely because it has not been invested with jurisdiction over other cases not requiring similar treatment. This would be pushing attachment to tradition to an unjustifiable extreme. It may be laid down with reasonable certainty, therefore, that there is nothing in the constitution to prevent the limitation of the Commerce Court's jurisdiction exclusively to railroad cases.

The second point of difference, however, is rather more interesting. Opponents of the bill charge that, inasmuch as one of its expressed purposes is to secure an expert tribunal to decide railroad cases, it is rather absurd to limit to five years the time to be spent by the respective judges in the court, and to make them ineligible for a year after their periods of service have expired. Can we go further and say that this temporary tenure of office by the judges changes the character of the tribunal itself, and transforms it from a constitutional to a legislative court?

The distinction between the two classes of courts is well recognized in constitutional law. It was first announced by Chief Justice Marshall in American Ins. Co. v. 356 Bales of cotton, 1 Pet. 511 (1828), and has been been many times discussed since that time, under varying circumstances. The cases in the Supreme Court are collected and commented upon in McAllister v. United States, 141 U. S. 174 (1891). In all of them the test principally

relied upon to distinguish the constitutional from the non-constitutional court is the judge's tenure of office: service during good behavior, stated compensation that may not be diminished during his term of office, and removal only after impeachment, being regarded as essential to the existence of a constitutional court. The only other element is that mentioned in Gordon v. United States, 2 Wallace 561 (1865), as characteristic of every judicial body, namely, the immunity of its orders from revision by an executive department.

Now it is true that the judges of the Court of Commerce hold judicial office during good behavior. It is equally true that they sit in that court for limited periods only. Hence the precise question arises, does the constitutional requirement apply to his tenure of office in the particular court to which a judge is appointed, or is it sufficient for him to be invested with general judicial authority for life without regard to the court in which it is to be exercised?

This question is not free from difficulty, and receives little light from the decided cases for the reason already stated, that a special tribunal such as the Court of Commerce has been heretofore unknown to the law. There is, undoubtedly, a considerable difference between the powers and duties of a judge of the Court of Commerce and those of an ordinary circuit judge. Hence it can be seriously urged that when a judge of the Commerce Court is obliged to relinquish his duties and powers as such and to take his place in another court where the powers and duties are different, he is in effect being deprived of his former office. The converse of this proposition was maintained by Senator Bacon, of Georgia, in a speech delivered in the Senate on June 3, 1910, in which he attacked the bill as unconstitutional for the reason that in transferring circuit judges to this new and different court for periods of five years, it would similarly deprive them of their offices during that period, and thus nullify the life tenure guaranty of the Constitution. To meet the argument drawn from the present law directing assignments of circuit or district judges to circuit and district courts of other districts, and to the circuit court of appeals, Senator Bacon pointed out that

the powers which an assigned judge exercises in these courts are still those of a circuit or a district judge. "His powers are just the same; his duties are just the same; his emoluments are just the same; his privileges and his rights are just the same. In other words, he is still, without interruption a circuit judge of the United States. In the same way, when a district judge is transferred from one district to the other, he in no manner is abridged in his rights and his privileges and his tenure of office as a district judge." But on the other hand, "when he is removed as a judge of the circuit court he ceases to be, for the time, a judge of any circuit court in the United States, and he ceases to exercise any of the powers of a judge of the circuit court of the United States."

This proposition, if pushed to its logical conclusion, would seem to identify the "powers and duties" of a circuit judge with his "office." It in effect guarantees to him the continuance of the powers and duties vested in the circuit courts at the time he happened to be appointed, although the greater number of those powers and duties are of statutory origin only. It would prevent Congress from changing the organization of the inferior federal courts during the lifetime of any of the judges appointed to office during its existence. It would really stand in the way of any addition to or subtraction from the jurisdiction of such courts as it existed at the time their judges were appointed. Surely the constitutional right of a judge to life tenure of office cannot have been intended so to hamper the power of Congress to "ordain and establish" inferior federal courts. Yet this conclusion seems immediately to follow from Senator Bacon's argument, that the circuit judges are in effect deprived of their offices solely because for five years they are forbidden to exercise their powers as circuit judges. The same result *pro tanto* would follow from an act in any degree curtailing or changing their present powers.

The constitutional guaranties attached to the judicial office are primarily for the benefit of the nation and not of the judges themselves. They are designed to secure an independent judiciary. They should not be unduly extended beyond the point essential to the effectuation of this general purpose. They should

not be allowed to invest the judges with purely personal privileges that will unnecessarily stand in the way of such reforms and changes in the judicial system as Congress may deem to be expedient. The Constitution never intended any such result. Now, the present law will lessen neither the independence nor the dignity of the judges assigned to the Commerce Court. Their emoluments, powers, and influence are essentially the same. It is of course conceivable that an individual judge might prefer to stay at home and exercise a general rather than a special jurisdiction, but this is immaterial. So long as his fundamental rights are not interfered with; so long as he retains ample power to hear and determine cases within the special jurisdiction assigned him under the usual forms of law, to enforce orderly procedure, and to execute judgments of the court by adequate judicial process, subject to no revision or control save by appeal to a higher court—so long are the substantial requirements of the Constitution complied with. In other words, it is necessary only that the judge be allowed to retain his judicial office in general, with his dignities, independence, and powers substantially unimpaired; and inasmuch as these are not affected either by a circuit judge's transfer to the Commerce Court, or by the transfer of a judge of the Commerce Court to the circuit court, it would appear that the new law is perfectly constitutional in this particular, however unwise might be its policy.

Much of the opposition manifested toward the court feature of the present bill was based upon the belief that a special tribunal for the trial of railway cases was wholly unnecessary on account of the small number of cases which it would be called upon to decide. Thus, the minority members of the House Committee on Interstate Commerce state in their report: "It is undoubtedly true if certain provisions of this bill were eliminated the Commerce Court would be stripped largely of its proposed work. There is no necessity for this Commerce Court; and the testimony of two of the Commissioners who appeared before the Committee goes to clearly indicate that if the court is established it will be without sufficient business to occupy its time."

The provision referred to in the first part of the above state-

ment is Section 12 of the House bill as amended in committee, which section also appears in the Senate bill as reported. This section provided, in effect, that no interstate carrier should acquire any interest, direct or indirect, in the capital stock, property, or management of "any railroad, or water line which is directly and substantially competitive with that of such first-named corporation;" and that any carrier desiring to acquire any interest in the stock or to lease or purchase the property of another must file a petition in the Commerce Court setting forth the contract for the proposed acquisition and asking for an adjudication as to whether or not it violates this section, which adjudication "shall have the ordinary effect of judgments as an estoppel between the parties."

If this section had been enacted into law, it would doubtless have provided many cases for the Commerce Court to determine. But the opposition it encountered is not surprising. The proceeding contemplated was certainly "a novel kind of law suit," inasmuch as the Court of Commerce is authorized and directed to ''hear and decide cases before the transaction out of which they arise takes place." (Report of Minority, Senate Committee, p. 26.) This, of course, is contrary to all the traditions of our judiciary. In addition, the bill as originally introduced into both houses, and as reported back to the Senate, contained this further clause: ''In making the determination herein provided for, the court shall take into consideration the effect of such proposed acquisition upon the due observance and effective enforcement of all the laws of the United States, and the relative importance of any benefit to the public interest and of any effect upon competition resulting from such acquisition."

This language, it was argued in the report of the minority members of the Senate Committee, apparently confers upon the Commerce Court the power to disregard existing law in arriving at its decisions as to the legality of mergers, if it believes "that upon the whole the contemplated transaction will be of benefit to the public interest." The report continues: "To merely state such a doctrine is to pronounce its severest condemnation. It is manifest that the attempt to bestow such jurisdiction upon a

court is an attempt to grant the court legislative power; and if it could be done, it would violate the most cherished and the most sacred principles of representative government." These and similar considerations led to the elimination of this last-mentioned clause by the House Committee on Interstate Commerce and resulted finally in the defeat of the entire section.

As a result of this action, the jurisdiction of the Commerce Court is confined to the matters enumerated in Section 1 of the bill, to wit: . . . "The jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

"First: All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

"Second: Cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission.

"Third: Such cases as by Section Three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintained in a circuit court of the United States.

"Fourth: All such mandamus proceedings as under the provisions of Section Twenty or Section Twenty-three of the Act entitled 'An Act to regulate commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States."

Of these, the most important are the "suits to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission." This language is taken from Section 16 of the Hepburn Act of 1906, and assumes to vest in the Commerce Court the jurisdiction there conferred upon the circuit courts to review orders of the Commission passed in pursuance of the powers thereby granted to it. In order that there might be no mistake as to the extent of this court review, and also to put the seal of legislative approval upon the presently to be

discussed "Car Distribution Case," decided by the Supreme Court shortly after the introduction of the bill into Congress, the proviso was inserted that "Nothing in this act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court." This removes all doubt as to the intention of Congress to preserve unchanged the mode and extent of review exercisable over orders of the Interstate Commerce Commission under existing law. What this jurisdiction is must be determined by reference to previous acts and decisions.

Until the Hepburn act of 1906 was passed, the problem of a court review was not very pressing for the reason that no order of the Interstate Commerce Commission could be put into effect otherwise than by application to the courts for the aid of their process. This Act, however, after expressly conferring upon the Commission the power to prescribe rates and regulations respecting transportation generally, also provided that all orders of the Commission, other than those for the payment of money, should take effect *proprio vigore* within such reasonable time, not exceeding thirty days, as might be prescribed by that body. It was conceded that this change in the law would render necessary provisions for subjecting these orders to some manner of review by the courts, but opinions differed as to what should be the scope of the court proceeding. A notable contest was thus precipitated between advocates of a broad and of a narrow court review, respectively; the former, principally the friends of the railroads, desiring a review of such orders as nearly as might be upon the merits, the latter wishing to confine the courts to a determination of the question whether the order complained of would operate to deprive the carriers of their constitutional rights. The result was to vest in the circuit courts unrestricted power to hear and determine all suits "against the Commission to enjoin, set aside, annul, or suspend any order or requirement of the Commission," etc. This outcome was at the time regarded as a complete victory for the "broad-review" faction. Senator Bailey, who led the opposition forces, in his speech of May 11, 1906,

complained that, "Every act, important or unimportant, affecting a property right, is by the express terms of this amendment submitted to the judgment of the court; and therein lies the difference between a broad review and a narrow review." This was the assumption upon which the lower federal courts proceeded until the case of the Interstate Commerce Commission v. Illinois Central R. R. Co. ("The Car Distribution Case") was decided by the Supreme Court—one of the most important railroad cases ever adjudicated by that tribunal.

The opinion in this case made it appear that the narrow review advocates in 1906 had won their point without being aware of it. The decision was handed down January 10, 1910—just three days after the transmission of President Taft's message to Congress recommending the creation of the Commerce Court. So profoundly does it affect the jurisdiction of that tribunal that it was freely charged in Congress that if the decision could have been foreseen, the new court would never have been urged at all, and that the court provision was kept in the bill solely to save the face of the Administration.

This case was instituted to set aside an order of the Interstate Commerce Commission directing certain railroads, during times when there should be not enough cars available to handle the entire output from certain bituminous coal mines, to allot to each mine its pro rata share of cars according to its capacity, and in making the allotment to count against each mine as part of its share the railroad company's own cars sent for the purpose of hauling away coal purchased by it for use on its own lines. This order was enjoined by the lower federal courts, and the Interstate Commerce Commission appealed. After stating the facts, and quoting Section 4 of the act of 1906 putting into effect the orders of the Interstate Commerce Commission without prior submission to the courts, the Supreme Court said that "it becomes necessary to determine the extent of the powers which courts may exert on the subject."

The court then continues: "Beyond controversy, in determining whether an order of the Commission shall be sustained or set aside, we must consider (a) all relevant questions of constitu-

tional power or right; (b) all pertinent questions as to whether the administrative order is within the scope of the delegated authority under which it purports to have been made; and (c) a proposition which we state independently, although in its essence it may be contained in the previous ones, viz., whether even although the order be in form within the delegated power, nevertheless it must be treated as not embraced therein, because the exertion of authority which is questioned has been manifested in such an unreasonable manner as to cause it in truth to be within the elementary rule that the substance, and not the shadow, determines the validity of the exercise of the power. . . . Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative order upon our conception as to whether the administrative power has been wisely exercised. Power to make the order, and not the mere expediency or wisdom of having made it, is the question." The court then goes on to inquire whether the Commission had the power to issue the order complained of; and upon deciding that it had, the court declined to review the case upon the merits, although it recognized that the order might well be subject to criticism and might lead to some inequality. Such objections, it said, "but assail the wisdom of Congress in conferring upon the Commission the power which has been lodged in that body to consider complaints as to violations of the statute, and to correct them if found to exist, or attack as crude or inexpedient the action of the Commission in performance of the administrative functions vested in it, and upon such assumption invoke the exercise of unwarranted judicial power to correct the assumed evils." Accordingly, it reversed the decree of the court below.

This decision is very important in its bearing upon the present bill, and upon future legislation vesting additional powers in the Interstate Commerce Commission. It expressly recognized

the constitutionality of such delegations of authority, and thereby answers one of the questions hotly contested in the debates upon the Act of 1906. It appears, as indicated, that the narrow review senators have all they could desire in this decision. Only authority and constitutional right can be questioned, says the court; and this is precisely what the narrow review senators contended for. It is true that the present case was not concerned with rates, but the principle is the same. Deprivation of lawful use of property amounts to deprivation of the property itself; and if limitations upon use will be stricken down only when so unreasonable as to amount to confiscation, prescribed monetary returns thereon should be subjected to the same test. In either case, the court determines only the limit of confiscation, not reasonableness. In this respect, the Interstate Commerce Commission stands in the same position with Congress itself, inasmuch as its acts are invested with the force of law by the prerogative of Congress, not its own; and the same limit to the right of judicial review should be observed with reference to its acts as with reference to the acts of Congress itself.

Two Supreme Court decisions subsequent to the Illinois Central Case possess considerable interest in view of the principles there announced.

In Interstate Commerce Commission v. Northern Pacific R. R. Co., decided March 7, 1910, the court had before it an order of the Commission attempting to establish a through route and joint rates between eastern points and points on the Northern Pacific Railway between Portland and Seattle. There was already in existence at the time a through route between the points in question, but many travelers preferred and requested a more southerly route. In the Act of 1906, the Commission was given the power to establish through routes and joint rates when "no reasonable or satisfactory through route exists." The Supreme Court said: "It is urged that this condition is addressed only to the opinion of the Commission, and cannot be reëxamined by the courts as a jurisdictional fact. The difficulty of distinguishing between a rule of law for the guidance of a court and a limit set to its power is sometimes considerable. Words that might seem

to concern jurisdiction may be read as simply imposing a rule of decision, and often will be read in that way when dealing with a court of general powers. . . . But even in such a case there may be a difference of opinion, and when we are dealing with an administrative order that seriously affects property rights, and does so by way rather of fiat than of adjudication, there seems to be no reason for not taking the proviso of the statute in its natural sense. We are of opinion, then, that the Commission had no power to make the order if a reasonable and satisfactory through route already existed, and that the existence of such a route may be inquired into by the courts. How far the courts should go in that inquiry we need not now decide. No doubt, in complex and delicate cases great weight, at least, would be attached to the judgment of the Commission. But in the present instance there is no room for difference as to the facts, and the majority of the Commission plainly could not and would not have made the declaration in their order that there was no such through route, but for a view of the law upon which this court must pass." The court then examines the facts, and finds an undoubted preference for two through routes, but adds: "It appears to us that these grounds do not justify the order. The most that can be said of them is that they are reasons for desiring a second through route, but they are not reasons warranting the declaration that 'no reasonable or satisfactory through route exists.' Obviously, that is not true, except by an artificial use of words. It cannot be said that there is no such route, because the public would prefer two. The condition in the statute is not to be trifled away. Except in case of a need such as the statute implied, the injustice pointed out by the chairman in his dissent is not permitted by law." Accordingly, the decree of the lower court enjoining the Commission's order was unanimously affirmed.

This decision was not regarded by the court as overruling the "Car Distribution Case." Indeed, the latter is cited in support of it. The court apparently means to say nothing more than that it will not always treat the finding of the Commission as conclusive as to the existence of facts necessary to confer jurisdiction upon it to act in a particular case. Of course, if pushed to its

logical conclusion this holding would enable the court to review the Commission's order upon the merits in almost every case. Thus, it might be argued that since the Commission may alter a rate or an existing practice only in case the latter is unreasonable, unjust, or discriminatory, it follows that unless the rate or practice complained of does in fact exhibit these qualities, the Commission has no jurisdiction to change it. But if the court is to determine for itself the existence of these necessary jurisdictional facts, the court is of necessity led to review the Commission's order largely upon the merits. This difficulty is recognized by the court in the above case when it says it need not now decide how far it may go in its inquiry as to the existence of jurisdictional facts. It held there that their non-existence was so obvious that the court could plainly see that the Commission was exceeding its authority. So although it may be laid down generally that the decision of the Commission as to the existence of jurisdictional facts will not be reviewed unless plainly erroneous, it is for the court to say when the error is sufficiently plain to call for judicial correction. Thus, in spite of the apparently wide powers recognized by the Car Distribution Case, the effect of the later case will be to confer upon the courts a wide power of review should they see fit to exercise it.

We may note with interest that the language of the Hepburn act upon which the case just discussed was based has been omitted from the new railroad bill, so that the Commission's power to establish through routes is no longer limited by the express proviso that existing through routes shall be as a fact unreasonable or unsatisfactory.

The latest of the Supreme Court decisions would seem to promise a continuance of the court's disposition to allow the Commission a rather extensive field of uncontrolled action. This is the case of Interstate Commerce Commission v. Chicago, Rock Island & Pacific Ry. Company et al., decided May 31, 1910, the last day of the last term of Court. There had been complaints about certain through rates from the Atlantic seaboard to Kansas City, St. Joseph and Omaha, cities on the Missouri River. Upon investigation, the Commission found that the through

rates were made up of two parts: (a) the rates from points of origin to points of crossing at the Mississippi River, and (b) the local rates from these points of crossing to the Missouri River cities. The Commission decided that the through rate as a whole was too high because the latter constituent was unreasonable, and, accordingly, made an order reducing it very materially, while leaving unchanged the rate from points of origin to the Mississippi River. In attacking this order, the Western roads charged, among other things, that the purpose of the Commission was not so much to reduce unreasonable rates as to protect the Missouri River cities from competition of cities in the Central Traffic territory (the territory west of Buffalo, Pittsburg, and Parkersburg and east of the Mississippi River). This order, consequently, involved the assertion of a power on the part of the Commission "artificially to apportion out the country into zones tributary to given trade centers, to be predetermined by the Commission, and non-tributary to others." The lower federal court confined its opinion to this point, saying that the question "was not one of fact but one of power; it is not whether by the application of correct principles, a given rate had been decided to be unreasonable,—but whether the principles applied are within the power of the Commission."

The Supreme Court intimated that it would be an abuse of power for the Commission to raise or lower rates for the purposes above outlined. At the same time, the power of the Commission to reduce rates that are in themselves unreasonable was expressly recognized, although changes in rates will incidentally alter areas of competition, and affect trade conditions generally. All these are factors that must be considered in fixing a rate; but still, if the Commission is proceeding primarily to adjust rates in themselves unreasonable, its action is not rendered invalid by incidental effects upon trade conditions. The court then examined the Commission's action in this case, and concluded that there was not sufficient evidence to show that its action had been determined by the reasons found by the lower court. Hence, the Commission's order was held to be within its power, and could not be judicially reviewed upon the merits. As to the question

whether the rate fixed was unreasonable, the court said: "Such decision, we have said with tiresome repetition, is peculiarly the province of the Commission to make, and that its findings are fortified by presumptions of truth, 'due to the judgments of a tribunal appointed by law and informed by experience.' Illinois Central R. R. Company v. Interstate Commerce Commission, 206 U. S. 454." Here there was no evidence that the rates fixed will not yield to the carriers an "ample net profit," so the reduction "is neither directly nor indirectly obnoxious to the charge of taking private property without just compensation." Accordingly the judgment was reversed. Three justices dissented because they believed the lower court correct in its view of the purpose of the Commission's order.

Here, then, the validity of the delegation to the Commission of the power to fix railroad rates is recognized by the Supreme Court in a case involving the actual exercise of that power; and the limit of court review marked out in the "Car Distribution Case" is observed in reference to its scope. Beside determining these important constitutional questions, therefore, this latest decision appears to fortify the views of those persons who doubt the necessity of the Commerce Court. The work which it will be called upon to perform could be equally well left with the existing courts, so that whatever be the juridical character of the new tribunal, its creation is hardly justified by any existing exigency of practice.